IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE

APPEAL NO.524 OF 2004
IN
NOTICE OF MOTION NO. 1207 OF 2004
IN
TEST. SUIT NO.17 OF 1996
IN
TESTAMENTARY PETITION NO.132 OF 1996

Ila Vipin Pandya Appellant

versus

Smita Ambalal Patel Respondent

Mr. Rohit Kapadia, senior counsel with Mr. Kishore Jain, Mr.J.B. Sen, Mr.Shrikant Shah and Mr. S. D'Cruz i/b. M/s. Mehta & Girdharlal for the appellant.

Respondent present in person.

CORAM : R. M. LODHA &
J.P. DEVADHAR,JJ.

DATED : 25th August 2004

P.C.

Heard Mr. Rohit Kapadia, the learned senior counsel for the appellant. We also perused the impugned order and the available material.

2. The notice of motion was taken out by the appellant seeking the following reliefs:

"a) that, on deposit by the plaintiff of an amount of Rs.1,20,00,000/- or such other

amount as this Honourable Court may direct with the Prothonotary or Senior Master in Suit No.4892 of 1998 or on the plaintiff furnishing bank guarantee for an amount of Rs.1,20,00,000/- or such other amount as this Honourable Court may direct

i) this Honourable Court may be pleased to discharge the caveat filed by the Defendant and direct to issue Letters of Administration to the plaintiff in respect of the estate of the deceased Vipin Dalsukhram Pandya.

ii) In the alternative, to (i) above, this Honourable Court may be pleased to vacate all the interim orders passed by this Honourable Court and/or relieve plaintiff from statements and/or undertakings given on her behalf in the present suit and the proceedings therein. "

3. The learned testamentary Judge rejected the said notice of motion by the impugned order giving rise to the present appeal.

4. Mr.Rohit Kapadia, the learned senior counsel contends that the plaintiff is ready and willing to deposit the amount claimed by the respondent as creditor of the estate of deceased Vipin Pandya and thereupon the caveatable interest of the respondent comes to an end and, therefore, despite the earlier orders, the learned testamentary Judge ought to have discharged the caveat of the respondent. In the alternative, the learned senior counsel submitted that upon deposit of the amount as claimed by the respondent, the interim orders passed by the Court and the statements and undertakings given

by the present appellant ought to have been discharged.

5. We thoughtfully reflected over the contentions.

6. It is not in dispute that by the order dated 23rd December 1996 the learned Single Judge of this Court in the testamentary proceedings held that the present respondent has a caveatable interest being the creditor of the estate of the deceased Vipin Pandya and has an interest in the property and entitled to oppose the grant of letters of administration in favour of the plaintiff (present appellant). The learned Single Judge in her order dated 23rd December 1996 held thus:

> "If one goes through Petition No.132 of 1996, which is now converted into suit No.17 of 1996, it will be seen that the petitioner/plaintiff has nowhere disclosed her true relationship with the deceased. She has nowhere stated when she got married with Vipin Pandya, when their marriage was dissolved and when the petitioner again remarried the deceased Vipin Pandya. The petition is as cryptic as it could be. If the petitioner had indeed remarried Vipin Pandya after getting their marriage once dissolved, she should have made a clean breast of it in the petition. There is no reason why she should have suppressed this fact. In fact the petitioner does not give even the date of her first marriage with the deceased Vipin Pandya and not a whisper is there about the decree of divorce between the plaintiff and the deceased Vipin Pandya or her alleged remarriage with the said Vipin Pandya. The contention of Mr. Shah appearing for the plaintiff, so also the certificate which was sought to be tendered by him during the course of hearing, cannot be accepted at its face value. The question of deciding marital status of a person cannot be

done by resorting to this way. Formal proof of the documents as per the provisions of the Indian Evidence Act cannot dispensed with. That is not permissible and no conclusive finding can be given about legal status of any person unless the evidence is recorded and documents which are sought to be tendered are proved as per the provisions of the Indian Evidence Act. The plaintiff has certainly not come before the Court with clean hands as already discussed earlier. Therefore, the plaintiff will have to prove that she got in fact remarried with the deceased after her marriage was dissolved by decree of competent Court. Her status as a widow of the deceased is prima facie not proved and her legal status is thus under a cloud. Therefore, there is much substance when the Caveatrix states that the plaintiff not a fit person in favour of whom Letters of Administration with respect to the estate of the deceased should be granted.

13. Mr. Shah raised another point with respect to the right of the Caveatrix to file a Caveat opposing grant of Letters of Administration in favour of the plaintiff. He contended that in the affidavit in support of the Caveat, the caveatrix has not disclosed what interest she has in the estate of the deceased as required by Rule 402 of the High Court Original Side Rules. He also pointed out that the affidavit in support of the caveat was filed beyond the period of 8 days as was required by the very same Rule. This contention, however, does not hold much water as the very same rule gives discretion to the Court to allow the caveat to be filed even after the expiry of the said 8 days. No doubt, there is a delay of about five days in filing the affidavit in support of the caveat, but as the Caveatrix is appearing in person, some leniency has to be shown to her and the delay of five days has to be condoned. The same can be stated about the non-disclosure by the Caveatrix of her interest in opposing the grant of Letters of Administration in the affidavit in support. She has, however, disclosed it in the affidavit in reply to the Chamber Summons by stating that she being the creditor of the said Vipin Pandya, has an interest in the property and thus she is entitled to oppose the grant of Letters of Administration in favour of the plaintiff.

14. The question, therefore, that is before me is whether a creditor of the estate of the deceased has any locus to oppose the grant of Letters of Administration. Section 284 of the Indian Succession Act lays down rules about caveat against the grant of probate or Letters of Administration.

15. Normally a mere creditor of the deceased may not be said to have any interest in the estate so as to be enable to oppose the grant of Letters of Administration. His interest is only to see that the assets are sufficient to pay the debt of the deceased. The remedy of the creditor of the deceased under the normal circumstances would be to file a suit to recover the debt against the person in whose favour grant of Probate or Letters of Administration has been made. However, in the resent case, the facts are so peculiar that it will have to be held that the caveatrix as a creditor of the deceased has an interest to oppose the grant of Letters of Administration in favour of the plaintiff who claim to be the widow of the said deceased but whose claim appears to be dubious. Therefore, I am not at all inclined to grant prayer of the petitioner that the Caveat filed by the Caveatrix be dismissed at the outset."

7. The said order was challenged by the present appellant in appeal. The Division Bench presided over by the then Honourable Chief Justice dismissed the appeal by observing thus:

"2. The appellant has admitted that she had taken divorce from the deceased in the year 1984. Divorce decree was passed on 5th December 1984. However, it is her contention that she had remarried the deceased for which some form was filled in. That re-marriage is denied by the Respondent.

3. As against this, it is the case of the Respondent that she had married the deceased on 15th October 1991. It is

true that this fact is not properly stated by the Respondent, who appeared in person, in the affidavit-in-reply to the Chamber Summons.

4. Considering the dispute between the parties, it cannot be said that the order passed by the learned Single Judge rejecting the Chamber Summons calls for any interference."

8. The appellant carried the matter to the Supreme Court, but without success.

9. Admittedly the present respondent has filed suit being Suit No.4892/1998 against the present appellant and others praying therein that she be declared that she is a creditor of the estate of the deceased Vipin Pandya in a sum of over Rs.1,84,80,000/- along with interest thereon at the rate of 21% per annum from the date of the institution of suit until payment and realisation and other reliefs. The said Suit is pending.

10. In our considered view, it cannot be said that upon deposit of the amount as set out in the prayer of notice of motion by the appellant, the claim of the respondent would be discharged. If that be not so, how can it be said that by deposit of the amount as suggested by the appellant, the caveatable interest of the respondent shall come to an end. The fact of the matter is that present appellant is contesting the respondent's suit no.4892/1998 referred above tooth and nail. The very

fact that the respondent has to prosecute her claim in the suit no.4892/1998 as creditor of the estate of the deceased Vipin Pandya, we are afraid, the submission of the learned counsel that upon deposit of the amount as set out in the notice of motion by the appellant, the caveatable interest of the respondent comes to an end cannot be accepted.

11. As regards the alternative prayer made by the learned senior counsel that on deposit of the amount of as set out in the notice of motion, the interim orders presently operative may be vacated and statements and/or undertakings be relieved, we are not persuaded to accede to the said prayer for more than one reason. Firstly by the deposit of the amount suggested by the appellant, the claim of the respondent as creditor of the estate of the deceased Vipin Pandya shall not be discharged. The caveatable interest of the respondent continues. Secondly, because this very prayer was made in opposition to the appeal filed by the present respondent before the Division Bench, but the Division Bench in its order dated 28th April 1984 did not accept the said request. Thirdly, the suit is already ripe for hearing and it would not be in the interest of justice at this stage now to vary, modify or discharge the interim orders.

12. Appeal is, accordingly, dismissed in limine.

The ordinary copy of this order duly authenticated by the Court Associate may be provided to the parties on payment of usual copying charges immediately.

(R.M. LODHA, J.)

(J.P. DEVADHAR,J.)